Supreme Court, U.S.
FILED

No. 06-

06-795 DEC 6 - 2006

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In The

Supreme Court of the United States

KAY STONE,

Petitioner,

v.

THE HEALTH CARE AUTHORITY OF THE CITY OF HUNTSVILLE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May an employer avoid liability under the federal anti-discrimination laws for an employment decision that is the result of actions by a supervisor motivated by discrimination or retaliation by showing that a different official was the ultimate decisionmaker?

PARTIES

The parties to this action are set forth in the caption.

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OPINIONS BELOW

The September 7, 2006 opinion of the court of appeals, which is not officially reported, is set forth at pages 1a-3a of the Appendix. The March 28, 2006 memorandum opinion of the district court, which is not officially reported, is set forth at pages 4a-24a of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The employment anti-discrimination provision in the Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a), provides:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

The anti-retaliation provision in the Americans with Disabilities Act of 1990, 42 U.S.C. § 12203(a), provides:

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified,

> assi[illegible] or participated in any manner in an investi[illegible]on, proceeding, or hearing under this chapter.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, provides in pertinent part regarding discrimination and retaliation in employment:

> (a) No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .
>
> . . .
>
> (d) The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

STATEMENT OF THE CASE

This is a disability discrimination and retaliation case under the ADA and the Rehabilitation Act by Kay Stone against the Healthcare Authority of the City of Huntsville, Alabama, which operates Huntsville Hospital. Plaintiff alleges her dismissal by the hospital's Vice President for

Human Resources was orchestrated by plaintiff's immediate supervisor for discriminatory and retaliatory reasons. Plaintiff alleges the supervisor made a co-worker write a statement falsely accusing plaintiff of threatening to kill the supervisor. Plaintiff also alleges the supervisor ordered the co-worker to make the charge "stick" when she met with the Vice President. (Deposition of Amy Ashby at 156).

Plaintiff had actually made no threat to harm her supervisor. Upset after a counseling session with the supervisor, plaintiff told her mother after work that the supervisor had made her "so upset [she] felt like choking [the supervisor's] neck" or similar words to the same effect. (App. 11a). At lunch the next day she told the co-worker how she had felt the prior afternoon. (App. 11a). The co-worker told the supervisor. (App. 12a).[1] The supervisor made a report to her manager and to someone in the human resources department, who instructed her to have the co-worker document her conversation with plaintiff. (App. 11a).

The supervisor made the co-worker add false allegations to her written statement (Plaintiff's Exhibit 5) that transformed plaintiff's use of a common figure of speech into a present intent to kill. The supervisor's additions to the co-worker's statement included (1) that "[the plaintiff] wanted to wrap her hands around [the supervisor's] neck

[1] The district court states that the co-worker went to the supervisor out of concern for the supervisor's safety. (App. 11a). There is a dispute in the record on this point, however, as the co-worker also testified that she did not bring the comment by plaintiff to the supervisor's attention; rather, while laughing in a phone conversation initiated by the supervisor, the co-worker asked, "as a joking remark," what she had done to make the plaintiff so upset. (Deposition of Amy Ashby at 28-29, 105).

and strangle the life out of her before she clocked out yesterday," (Deposition of Amy Ashby at 34-36); (2) that plaintiff "stated she was serious" about harming the supervisor, (Deposition of Amy Ashby at 37); and (3) that plaintiff was "so furious and serious about doing harm that [the co-worker] felt it should be brought to [the supervisor's] attention," (Deposition of Amy Ashby at 37-38).

The district court dismissed the case on the hospital's motion for summary judgment.[2] The district court acknowledged a factual dispute regarding the supervisor's influence on the written statement the co-worker submitted but concluded the case could be decided without considering the statement's effect upon the Vice President's decision. (App. 11a n.4). The court resolved the case based on the reasonableness of the Vice President's actions on the day of plaintiff's termination. (App. 15a-16a). The Eleventh Circuit affirmed, stating in pertinent part that the record showed plaintiff was terminated for a threat against her supervisor. (App. 2a).

Neither the district court nor the court of appeals questioned that plaintiff had raised factual issues for trial regarding the supervisor's influence on the co-worker's written statement, the supervisor's influence on what the co-worker said to the Vice President, and the supervisor's

[2] This was the second motion for summary judgment granted by the court. The district court granted a prior motion, but the court of appeals reversed and remanded because the district court did not make findings of fact and conclusions of law. (App. 1a-2a).

having discriminatory and retaliatory motivations.[3] Neither opinion addressed these factual issues.

The opinions below instead focused on the reasonable perception of the Vice President that plaintiff threatened to kill the supervisor. Here, the Vice President conducted an investigation of the allegation, including interviewing the co-worker and interviewing plaintiff, and reasonably concluded, based on the information she had, that plaintiff threatened to kill her supervisor. (App. 11a-12a, 15a-16a).

The decisions of the district court and court of appeals are premised on the Vice President's acting in good faith and reasonably under the circumstances. Of course, barring a change of heart by either the supervisor or the co-worker, no investigation by the Vice President could have uncovered the falsity of the threat allegation. Thus, this case presents the question whether an employer may avoid liability for an employment decision that is the result of actions by a supervisor motivated by discrimination or retaliation by showing that a different official was the ultimate decisionmaker.

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[3] The supervisor told the co-worker she had been wanting to get rid of plaintiff for a long time. (Deposition of Amy Ashby at 86, 89).

REASON FOR GRANTING THE WRIT

THERE IS AN IMPORTANT INTER-CIRCUIT CONFLICT REGARDING WHETHER FEDERAL ANTI-DISCRIMINATION LAWS APPLY TO AN ACTION BY AN EMPLOYER THAT IS INFLUENCED OR CAUSED BY A SUPERVISOR WITH DISCRIMINATORY OR RETALIATORY MOTIVATION

There is an inter-circuit conflict regarding the application of federal anti-discrimination laws to employment decisions that result from the actions of a discriminatory or retaliatory supervisor but for which the supervisor was not officially responsible because of the involvement of another official, typically a person higher in the supervisory chain of command. In fact, currently pending before the Court are two petitions for certiorari that explain the conflict and the issue's importance and ask this Court to resolve the issue.

One petition is out of the Fourth Circuit, *Sawicki Petition*, No. 06-306, 2006 WL 2546436 (August 30, 2006), and the other is out of the Tenth Circuit, *BCI Coca-Cola Bottling Co. of Los Angeles Petition*, No. 06-341, 2006 WL 2582502 (September 5, 2006). These petitions will likely be ruled on prior to consideration of this petition. If one or both of these petitions is granted, petitioner requests that the Court hold her case pending the merits review and vacate and remand for reconsideration in light of the Court's ruling.

The Fourth Circuit has taken the most restrictive approach to resolving the employer liability issue presented. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004) (en banc), *cert. dismissed*, 543 U.S. 1132 (2005). In the Fourth Circuit, an employer is

only responsible for the actions of the official decisionmaker, "the one principally responsible for the decision or the actual decisionmaker for the employer;" the employer is not liable even if a subordinate supervisor "had a substantial influence on the ultimate decision or ... played a role, even a significant one, in the adverse employment decision." *Id.* Proof that a company official, acting for a discriminatory or retaliatory purpose, brought about the dismissal of an employee is insufficient to establish a violation of federal law in the Fourth Circuit unless that official made "the final or formal employment decision." *Id.*

The en banc majority in *Hill* acknowledged that its decision established an employer liability standard contrary to the one in other circuits but claimed the decisions in those circuits lacked an adequate "discussion of agency principles" and had "not always described the theory in consistent ways." *Id.* at 289-90. The dissenting opinion in *Hill* emphasized that the standard adopted by the majority was in conflict with decisions in numerous other circuits, which "have held that when the discriminatory bias of a subordinate influences an employment decision, the employer will be charged with the subordinate's bias." *Id.* at 302.

The Eleventh Circuit has taken an approach similar to the Fourth Circuit's. Though earlier Eleventh Circuit decisions appeared to recognize that influence was the touchstone for employer liability, *see Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1565 (11th Cir. 1987); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1526 (11th Cir. 1991), more recent decisions have repeatedly stated that an employer will only be liable for the discriminatory actions of a lower ranking official if the higher

ranking official "rubber stamped" a recommended employment action without examining its merits or otherwise was a mere "conduit" for another's decision. *See McShane v. U.S. Attorney General*, 1[illegible] Fed. Appx. 779, 791 (11th Cir. 2005) ("[A]lthough causation may be established, even when the person with the unlawful animus is not the decision-maker, the actual decision-maker must have acted in accordance with this person's decision, without the actual decision-maker himself evaluating the employee's situation."); *Wascura v. City of South Miami*, 257 F.3d 1238, 1247 (11th Cir. 2001) ("Therefore, even if the Commissioners did in fact merely 'rubber-stamp' the Mayor's recommendation that Wascura be terminated, this alone is insufficient to show pretext for discrimination. This is not a case in which a plaintiff has created a jury issue with respect to discrimination on the part of a dominant decision-maker whose decision was rubber-stamped by others."); *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999) (employer liable if official decisionmaker merely "acted as a . . . rubber stamp for [a third party's] recommendation"), *reh'g denied*, 200 F.3d 818, *cert. denied*, 529 U.S. 1053 (2000); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998) (employer liable if employee with discriminatory animus is the real decisionmaker because "the titular 'decisionmaker' is a mere conduit"), *reh'g denied*, 178 F.3d 1305, *cert. denied*, 528 U.S. 930 (1999).

While in the Eleventh Circuit the door is theoretically open to employer liability for some employment actions caused by non-decisionmakers, it is apparent that the door is not open wide enough for many victims of discrimination to get through. Only rarely will an employee be able to meet the rubber stamp standard.

The rarity of employer liability under the rubber stamp standard in the Eleventh Circuit can readily be seen by its application to Huntsville Hospital. As a practical matter, by having the Vice President for Human Resources review the merits of all significant employment actions, as she did the one here, Huntsville Hospital can effectively insulate itself from liability under the anti-discrimination laws for most, if not all, of its employment decisions, regardless of whether a particular action resulted from a supervisor recommendation motivated by discrimination or retaliation.

The strict approach of the Fourth Circuit has been expressly rejected by two circuits, and these circuits necessarily reject the rubber stamp standard applied in the Eleventh Circuit as well.

Hill was expressly rejected by the Seventh Circuit in *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004). *Hill* rested its decision heavily on the Seventh Circuit decision in *Shager v. Upjohn Co.*, 913 F.2d 398 (1990), because *Shage*r was cited by this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 762-63 (1998). 354 F.3d at 288. Judge Posner, the author of *Shager*, explained that *Hill* was based on a flawed reading of *Shager* and inconsistent with traditional causation analysis:

> We are mindful that *Hill* . . . holds that a subordinate's influence, even substantial influence, over the supervisor's decision is not enough to impute the discriminatory motives of the subordinate to the supervisor; the supervisor must be the subordinate's "cat's paw" for such imputation to be permitted. That is not the view of this court, even though the "cat's paw" formula apparently originated in our decision in *Shager*. . . .

> The formula was (obviously) not intended to be taken literally (Sealy employs no felines), and were it taken even semiliterally it would be inconsistent with the normal analysis of causal issues in tort litigation. If [the higher ranking official] would not have turned down Lust for the promotion had it not been for [the lower ranking official's] recommendation, a recommendation that the jury could reasonably find was motivated by sexist attitudes, then [the lower ranking official's] sexism was a cause of Lust's injury, whether or not [the higher ranking official] could reasonably be thought a mere cat's paw.

Lust, 383 F.3d at 584.

The Seventh Circuit has repeatedly found liability when an employer's decision was influenced by the actions of a lower ranking official who, for discriminatory or retaliatory reasons, provided false information to the actual decisionmaker. *See David v. Caterpillar, Inc.*, 324 F.3d 851, 861 (7th Cir. 2003) ("[W]e have stated that the retaliatory motive of a 'nondecisionmaker' may be imputed to the company where the 'nondecisionmaker' influenced the employment decision by concealing relevant information from, or feeding false information to, the ultimate decisionmaker."); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (7th Cir. 1997) (opinion by Posner, J.) ("[There is] one situation in which the prejudices of an employee, normally a subordinate . . . , are imputed to the employee who has formal authority over the plaintiff's job. That is where the subordinate, by concealing relevant information from the decisionmaking employee or feeding false information to him, is able to influence the decision . . . . In such a case, the discriminatory motive of the other employee, not the autonomous judgment of the nondiscriminating

decision-maker, is the real cause of the adverse employment action."); *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997) ("[T]he forbidden motive of a subordinate employee can be imputed to the employer . . . [if] a subordinate, by concealing relevant information from the decisionmaker, is able to manipulate the decisionmaking process and to influence the decision.") (citing *Shager*); *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1147 (7th Cir. 1993) ("An employer cannot escape responsibility for wilful discrimination by multiple layers of paper review, when the facts on which the reviewers rely have been filtered by a manager determined to purge the labor force of older workers.") (citing *Shager*); *Dey v. Colt Construction & Development Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994) ("Summary judgment generally is improper where the plaintiff can show that an employee with discriminatory animus provided . . . input that may have affected the adverse employment action."); *Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1155 (7th Cir. 1989) (affirming finding of liability because of evidence that the actual decisionmaker "accepted . . . input" from biased official in deciding to fire the plaintiff).

Hill was also expressly rejected by the Tenth Circuit in *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006). The Tenth Circuit described the Fourth Circuit's position in *Hill* as "extreme," *id.* at 487, and, following *Lust*, rejected the Fourth Circuit's approach as "inconsistent with the normal analysis of causal issues in tort litigation," *id.* (quoting *Lust*, 383 F.3d at 584).

The Tenth Circuit rejected a claim by the *Hill* court that its approach was supported by this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000). *Hill* had relied in part on a passage in *Reeves*

describing a company official in that case as the "actual decisionmaker." *See Hill*, 354 F.3d at 288 (citing *Reeves*, 530 U.S. at 151-53). The Tenth Circuit found that "the Fourth Circuit [made] too much of the phrase 'actual decisionmaker' in *Reeves*" because "the Court was describing what the petitioner's evidence showed, not prescribing the 'outer contours' of liability." *BCI*, 450 F.3d at 487. It found "[t]he Fourth Circuit's peculiar focus on 'who is the "decision-maker" for purposes of discrimination actions,' *Hill*, 354 F.3d at 286, . . . misplaced," as "[t]he word 'decisionmaker' appears nowhere in Title VII." *Id.*

The Tenth Circuit in *BCI* also expressly disagreed with the position of the Seventh Circuit and other circuits that employers are liable when a biased subordinate has had "influence," stating that "[s]ome circuits take a lenient approach, formulating the inquiry as whether the subordinate "possessed leverage or exerted influence[ ] over the titular decisionmaker." *Id.* The court reasoned that "[s]uch a weak relationship between the subordinate's actions and the ultimate employment decision improperly eliminates a requirement of causation." *Id.* at 486-87. The Tenth Circuit limits employer liability to cases in which "the biased subordinate's discriminatory reports, recommendation, or other actions **caused** the adverse employment action." *Id.* at 487 (emphasis added).

In addition to the Seventh and Tenth Circuits, eight other circuits, the First, Second, Third, Fifth, Sixth, Eighth, Ninth, and District of Columbia Circuits, reject the strict approach of the Fourth and Eleventh Circuits. These circuits authorize employer liability if a biased subordinate exerts influence over or is involved in the decision. *See Sawicki Petition*, No. 06-306 at 20, 2006 WL 2546436 at 14-15 (collecting cases).

Whether a test involving "influence" as the touchstone or a "caused" standard is applied, the actions of plaintiff's supervisor at issue in this case are actions for which Huntsville Hospital may be liable. Only under the restrictive approaches in the Fourth and Eleventh Circuits would plaintiff have no remedy.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter. Alternatively, if the Court grants one or both of the pending petitions for review raising the issue presented here, petitioner requests that this petition be held pending the merits review and that the decision of the court of appeals be vacated and remanded for reconsideration in light of the Court's ruling.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-12206
Non-Argument Calendar

D. C. Docket No. 01-01862-CV-HS-NW

KAY STONE,

Plaintiff-Appellant,

versus

HEALTH CARE AUTHORITY OF THE
CITY OF HUNTSVILLE, THE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(September 7, 2006)

Before ANDERSON, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

This is the second time we have considered an appeal of this case. In the first appeal, we vacated the district court's order granting summary judgment in favor of the Health Care Authority of the City of Huntsville ("Huntsville Hospital") for failure to make findings of fact and

conclusions of law and remanded the case for further proceedings consistent with our opinion. *See Stone v. The Health Care Authority of the City of Huntsville*, No. 03-10829 (11th Cir. Oct. 10, 2003). On remand, the district court once again granted summary judgment in favor of Huntsville Hospital and complied with our mandate by making detailed findings of fact and conclusions of law.

Appellant Kay Stone ("Stone") commenced this action by filing a complaint alleging separate and individual violations of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101-12213, as amended, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. We review a district court's grant of summary judgment *de novo*. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1085 (11th Cir. 2004).

After reviewing the record and reading the parties' briefs, we conclude that Stone failed to produce sufficient evidence that Huntsville Hospital discriminated against her because of her disability sufficient to overcome summary judgment. In fact, the record demonstrates that the reason for Stone's termination was her threat made against her supervisor.[1] Moreover, the undisputed record of evidence demonstrates that no reasonable accommodations were denied to Stone and Huntsville Hospital did not retaliate against her.

For the above-stated reasons, we affirm the district court's order granting summary judgment in favor of

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[1] The record also demonstrates that Huntsville Hospital terminated an African-American employee earlier the same week it terminated Stone for making similar threats in the workplace.

Huntsville Hospital on Stone's discrimination, retaliation, and failure to accommodate claims.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

KAY STONE, Plaintiff, v. THE HEALTH CARE AUTHORITY OF THE CITY OF HUNTSVILLE, Defendant.	)	CIVIL ACTION NO. 3:01-CV-01862-VEH

MEMORANDUM OPINION

(Filed Mar. 28, 2006)

This matter is before the Court on Defendant Health Care Authority of the City of Huntsville's (hereinafter "Huntsville Hospital") October 17, 2002, motion for summary judgement as to Plaintiff Kay Stone's (hereinafter "Stone") claims. Stone commenced this action on July 27, 2001, by filing a complaint in this Court alleging separate and individual violations of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, as amended, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 294. [Complaint ¶ 1]. Stone alleges that she is a qualified individual with a disability who suffers from Attention Deficit-Hyperactivity Disorder (hereinafter "ADHD"), depression, post-traumatic stress syndrome, and borderline I.Q. [Complaint ¶¶ 8, 10]. Stone contends that Huntsville Hospital refused to accommodate her disabilities and on or about March 31, 2000 Huntsville Hospital discharged Stone because of her disabilities and/or her requests for accommodation. [Complaint ¶¶ 11-13].

Defendant's motion was initially before the Honorable Judge Lynwood Smith. Judge Smith granted summary judgment in favor of the Defendant and adopted the Defendant's briefs as the opinion of the Court. This decision was appealed and the Eleventh Circuit Court of Appeals vacated and remanded Judge Smith's decision.[1] This matter is now properly before this Court.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000). The party asking for summary judgment always bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings or filings which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. Once the moving party has met his burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and by his own affidavits, or by the depositions, answers to interrogatories, and admissions of file, designate specific

[1] The opinion was vacated and remanded on the grounds of Judge Smith's decision to adopt the Defendant's briefs as the opinion of the Court. However, the 11th Circuit Court also noted that genuine issues of material fact may exist which would also preclude the case from summary judgement.

facts showing that there is a genuine issue for trial. *Id.* at 324.

The substantive law will identify which facts are material and which are irrelevant. *Chapman*, 229 F.3d at 1023; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the non-movant. *Chapman*, 229 F.3d at 1023; *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248; *Chapman*, 229 F.3d at 1023. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249.

The method used by the party moving for summary judgment to discharge its initial burden depends on whether that party bears the burden of proof on the issue at trial. *See Fitzpatrick*, 2 F.3d at 1115-17 (citing *United States v. Four Parcels of Real Property*, 941 F.2d 1428 (11th Cir. 1991) (en banc)). If the moving party bears the burden of proof at trial, then it can only meet its initial burden on summary judgment by coming forward with positive evidence demonstrating the absence of a genuine issue of material fact; i.e. facts that would entitle it to a directed verdict if not controverted at trial. *Fitzpatrick*, 2 F.3d at 1115. Once the moving party makes such a showing, the burden shifts to the non-moving party to produce significant, probative evidence demonstrating a genuine issue for trial.

If the moving party does not bear the burden of proof at trial, it can satisfy its initial burden on summary

judgment in either of two ways. First, the moving party may produce affirmative evidence negating a material fact, thus demonstrating that the non-moving party will be unable to prove its case at trial. Once the moving party satisfies its burden using this method, the non-moving party must respond with positive evidence sufficient to resist a motion for directed verdict at trial. The second method by which the moving party who does not bear the burden of proof at trial can satisfy its initial burden on summary judgment is to *affirmatively* show the absence of evidence in the record to support a judgment for the non-moving party on the issue in question. This method requires more than a simple statement that the non-moving party cannot meet its burden at trial but does not require evidence negating the nonmovant's claim; it simply requires the movant to point out to the district court that there is an absence of evidence to support the non-moving party's case. *Fitzpatrick*, 2 F.3d at 1115-16. If the movant meets its initial burden by using this second method, the non-moving party may either point out to the court record evidence, overlooked or ignored by the movant, sufficient to withstand a directed verdict, or the non-moving party may come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency. However, when responding, the non-movant can no longer rest on mere allegations, but must set forth evidence of specific facts. *Lewis v. Casey*, 518 U.S. 343, 358 (1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

FACTS[2]

Stone suffers from type I diabetes and at various times during her life has been diagnosed with attention deficit hyperactivity disorder (ADHD), depression, various personality disorders, post-traumatic stress syndrome (PTSD), bulimia, laxative abuse, trichotillomania (pulling out your own hair), and borderline I.Q. [Complaint ¶ 8; Dr. Sandy Depo. at 42-44, 49-51, 57-58, 63, 108; Dr. Johnson Depo. at 19-22]. As a result of these disabilities, Stone is impaired in the following areas: (1) her ability to communicate; (2) her ability to function socially; (3) her ability to learn new tasks and; (3) her ability to work. [Dr. Sandy Depo. at 95, 145, 187, 210, 232-34, 249-250, 300-301].

Stone was a full-time employee of Huntsville Hospital from 1990 until her termination on March 31, 2000. [K. Stone Depo. at 9-10]. During the early years of her employment Stone's primary job was filing but she was also used to fill in for three mail couriers in the event of a courier's absence. [McGaha Aff. ¶ 3]. There were three mail couriers; two delivered mail on the outside routes of the hospital and the other delivered mail on the inside route. If any of those couriers were absent, Stone was assigned to cover the inside route and the other two couriers were assigned to the outside routes. [K. Stone Depo. at 73-77]. Stone was unable to perform the outside routes because she was prohibited from driving after an automobile accident in 1994; this accident created problems with Stone's ability to obtain coverage under the Hospital's liability insurance policy. [Rosler Depo. at 67-68]. As an

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[2] Where facts are disputed, the Court, as it must, has viewed the facts in the light most favorable to Stone, the non-movant. *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000).

accommodation for Stone's diabetes and inability to drive, other hospital employees would drive her to the post office whenever it was her responsibility to pick up the mail. [Pl. Depo. at 199-202].

By the late 1990's, Huntsville Hospital stopped maintaining hard-copy records of patient admissions and emergency room treatments. [Newby Depo. at 35-36]. These categories were two of the three categories which Stone was responsible for filing. [Henderson Depo. at 181-86]. The elimination of these two categories caused Stone's filing duties to be decreased. [Newby Depo. at 35-36; Henderson Depo. at 181-86].

As a result of this decrease in duties, Stone was reclassified as a "courier/file clerk" and she was used to perform tasks in other areas of the office on a more frequent basis. [Pl. Depo. at 93-94, 125-128; Newby Depo. at 45; Henderson Depo. at 181-86]. However, Stone maintains that her filing work was her essential function and her work as a relief courier was a "secondary" function. [Pl. Ex. 47 at HH0045-HH0047 (1999)]. Huntsville Hospital contends that by the end of 2001, Stone's old job as a file clerk had been totally eliminated. [Henderson Aff. ¶ 15]. There is currently no file clerk or file room in the Patient Accounting Office where Stone previously worked. [Newby Depo. at 44-45].

In late 1999, one of the mail employees who was regularly assigned to cover the inside mail route had to be off work for several months. [Rosler Depo. II at 163-167]. Consequently, Stone was assigned to mail courier duties with increasing frequency. [Rosler Depo. II at 163-167]. During this time period, Stone's anxieties increased, her work performance decreased, and tensions escalated

between Stone and her supervisor, JoAnn McGaha (hereinafter "McGaha"). [X21 to K. Stone Depo.]. Stone contends that her problems completing the mail rounds were not new but rather made issue only toward the end of her employment. [K. Stone Aff. at ¶ 26]. Stone's work related problems resulted in constant oral and written reprimand. [K. Stone Aff. at ¶ 26]. The primary issue surrounding Stone's completion of the mail rounds involved timing. It was important that the mail be delivered in a timely manner to the various departments within the hospital because sometimes the mail delivery affected other aspects of the Hospital's business. [Rosler Depo. II at 152]. For example, the Business Office's needed the mail by a certain hour in order to make timely bank deposits which would then be eligible for daily interest. [Rosler Depo. II at 152-154]. Although Stone usually delivered the mail on time, she was often late enough that various departments complained that they were not getting their mail on time. [Freeman Depo. at 61, 65, 68-76; Rosler Depo. at 117-22 & EX 44 thereto].

Stone alleges that she was mistreated by McGaha during the latter periods of her employment. [K. Stone Aff. at ¶ 18-19]. Huntsville Hospital denies this assertion and both parties proffer deposition testimony to support their contentions. Stone admits that she is more sensitive than the average person but she claims that the harsh treatment adversely affected her job performance.[3] [Pl. Br. at 11].

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[3] The Court has taken notice of the several pieces of correspondence between Stone and McGaha and other Huntsville Hospital personnel which have been incorporated into the Plaintiff's briefs. For the sake of brevity, such correspondence will be referred to as needed in

(Continued on following page)

On the afternoon of March 30, 2000, McGaha called Stone into her office and counseled her regarding her job performance. [PX 63]. During this counseling, Stone became upset and after work she said to her mother: "[m]om, JoAnn just got me so upset I felt like choking her neck" or similar words to the same effect. [R. Stone Depo. at 140-41; DX 61]. Stone's mother helped her prepare a letter to McGaha which discussed the manner in which McGaha had addressed Stone the previous day. [PX 62]. McGaha received the letter the next morning, then drove Stone to the Post Office to get the mail. [McGaha Depo. at 28, 33, 113]. That morning Stone did her inside mail rounds without incident. [McGaha Depo. at 21, 27]. During her lunch break, Stone told a co-worker, Amy Ashby (hereinafter "Ashby"), that she had been so angry with McGaha the previous afternoon that she felt like she was going to choke McGaha's neck; she then made a choking gesture with her hands. [Ashby Depo. at 25-26]. Based on the conversation with Stone, Ashby believed that JoAnn McGaha was in danger of imminent harm. [Ashby Depo. at 25-26]. Because of her concerns, Ashby approached McGaha and told her about the conversation she had with Stone during lunch. [Ashby Depo. at 24-31]. McGaha then reported this information to the Human Resources Department and her manager, Jan Henderson. [McGaha Depo. at 141-53]. Human Resources instructed McGaha to have Ashby document her conversation with Stone.[4]

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the "analysis" portion of this opinion and will not be specifically addressed in the "facts" portion.

[4] The Court has taken notice of the conflicting evidence presented by the parties regarding the statement Ashby provided to the Human Resources Department. The Court cannot make findings of credibility at the summary judgement stage, however, the Court has determined

(Continued on following page)

[Rosler Depo. II at 292-93]. McGaha then reported to the office of Andrea Rosler, Vice President of Human Resources. [Rosler Depo. at 211-12]. Rosler explained that she wanted to meet with Ashby personally and hear exactly what Stone said; McGaha was given permission to go home early. [Rosler Aff. 1154; Rosler Depo. at 295-96].

After meeting with Ashby, Jan Henderson and Andrea Rosler met with Stone and, during their meeting, Stone admitted to making the alleged statement. [Rosler Aff. ¶ 61; K. Stone Depo. at 248-49 & Ex. 59 thereto; Henderson Depo. at 134]. The meeting concluded when Andrea Rosier made the decision to terminate Stone's employment with Huntsville Hospital. [Rosler Aff. ¶ 52, 66]. Shortly after her termination, Stone wrote a description of her termination meeting and in her own handwriting stated: "Andrea Rosler asked me if I said that I felt like choking Joan McGaha's neck and me being honest I said yes . . . " [K. Stone Depo. at 251-52 & Ex. 59 thereto].

Huntsville Hospital has a zero-tolerance policy regarding workplace threats; this policy states that you are not allowed to threaten another hospital employee regardless of your true intentions. [Rosler Depo. at 182-90, 216].

Two days before Stone's termination, another hospital employee was terminated for making a threat after a confrontation with another hospital employee. [Rosler Aff. ¶¶ 67-68; Rosler Depo. at 240-41]. This particular employee

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that the conflicting statements given by Ashby are not needed to determine summary judgement in this case. Consequently, the opinion of this Court has not been founded on Ashby's statement to Human Resources.

claimed that he was not "serious," however, Rosler terminated his employment. [Rosler Aff. ¶¶ 67-68; Rosler Depo. at 240-41].

ANALYSIS

Stone presents three claims for this Court address, Stone contends: (1) she suffered a discriminatory discharge because of her disabilities; (2) she was retaliated against because of her requests for accommodation and; (3) Huntsville Hospital failed to accommodate her disabilities as required under the ADA. [Complaint ¶¶ 12, 14]. Each of the aforementioned claims will be addressed individually.

I. Discriminatory Discharge

The ADA provides that an employer may not discriminate against an individual with a disability because of that disability with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). In order to prevail on an ADA claim, a plaintiff must first establish that "(1) she has a disability; (2) she is a qualified individual; and (3) she was unlawfully subjected to discrimination because of this disability." *LaChance v. Duffy's Draft House, Inc.,* 146 F.3d 832, 835 (11th Cir. 1998). Discrimination claims under the Rehabilitation Act of 1973 are governed by the same proof standards used in ADA cases. *Holbrook v. City of Alpharetta, Georgia,* 112 F.3d 1522, 1526 n.2 (11th Cir. 1997). Thus, "cases decided under the Rehabilitation Act are precedent for cases under

the ADA, and vice versa." *Cash v. Smith,* 231 F.3d 1301, 1305 n.2 (11th Cir. 2000).

For the purposes of this motion only, Huntsville Hospital does not dispute that Stone is disabled within the meaning of the ADA. [Def. Br. at 41]. Therefore, Stone only bears the burden of proving that (1) she is a qualified individual and; (2) she was unlawfully subjected to discrimination.

Huntsville Hospital contends that Stone is not a qualified individual within the meaning of the ADA because she presented a direct threat to the Hospital staff, specifically McGaha. [Pl. Br. at 42]. The ADA permits an employer to discharge a disabled employee if the employee is a "direct threat" to the health and safety of other individuals in the workplace. *See* 42 U.S.C. § 12113(a), (b); *Moses v. American Nonwovens, Inc.,* 97 F.3d 446, 447 (11th Cir. 1996). The ADA defines direct threat as "a significant risk to the health or safety of others that cannot be eliminated by a reasonable accommodation." 42 U.S.C. § 12111(3). The Eleventh Circuit has held that the plaintiff in an ADA case has the burden of proving that she was not a "direct threat." *See LaChance,* 146 F.3d at 836. Accordingly, Stone has the burden of proving that she was not a direct threat to herself, or McGaha.

Huntsville Hospital contends that Stone's statement that she wanted to choke McGaha constituted a direct threat and therefore justified her termination in light of her disability. Stone contends that her threats were not serious and were merely a figure of speech and that it was Huntsville Hospital's failure to accommodate her disability which caused her outburst. Stone also alleges that Huntsville Hospital did not perform a reasonable investigation

into her actions before making the decision to terminate her employment.

In the instant case, it is Stone's own handwritten account of the events as they occurred on the date of her termination which casts the most doubt on her contentions regarding her "seriousness." Stone stated in her own handwritten testimony, on two separate occasions that: (1) "I said to my Mom that I was going to choke her neck" and; (2) "I talked to Amy as I usually do and I said that I had felt like chocking [sic] JoAnn's neck . . . Andrea Rosler asked me if I said that I felt like choking JoAnn McGaha's neck and me being honest I said yes . . . she made me mad" [DX 59 to K.Stone Depo.]. Stone's assertion that she was not "serious" does nothing to rebut the fact that she may have been perceived as a direct threat on the day in question. The implementing regulations require that:

> "[t]he determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence." 29 C.F.R. § 1630.2(r).

The key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action. *See Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998).

In the instant case, it is clear that Huntsville Hospital relied on "the best available objective evidence" when it made the decision to terminate Stone. Stone made a threat, another co-worker reported the threat, HR spoke

with Stone, and she was terminated. The ADA does not require an employer to retain a potentially violent employee because such a requirement would place the employer in jeopardy of violating the Act if it fired such an employee, yet in jeopardy of being deemed negligent if the employee were retained and later harmed someone. *Palmer v. Circuit Court of Cook County Illinois,* 117 F.3d 351 (7th Cir. 1997). Additionally, Huntsville Hospital presented evidence that it had recently terminated an African-American employee earlier in the week for making similar threats in the workplace. Under the same theory presented in *Palmer,* the retention of Stone after a blatant violation of Huntsville Hospital's policy may have subjected the Hospital to liability under Title VII from the employee who was terminated for his violation of the same policy.

Stone's own undisputed testimony affirms the fact that Huntsville Hospital could, in good faith, perceive Stone as a direct threat to McGaha. Stone's assertion that these words were merely a "figure of speech" are without merit and no precedent is cited to support Stone's contentions that the "seriousness" of a threat should be determined by the advocate of such statements. The Court has therefore determined that Stone could, in good faith, be perceived as a direct threat to McGaha. Because Stone posed a direct threat to McGaha, she is not considered a "qualified" individual under the ADA and therefore cannot establish a prima facie case of discrimination. Accordingly, Huntsville Hospital is entitled to summary judgment as to this claim.

II. Retaliation

To establish a prima facie case of retaliation under the ADA, Stone must show (1) that she engaged in a protected expression or activity; (2) she suffered an adverse employment action; (3) the adverse action was causally related to the protected expression or activity. *See Wideman v. Wal-Mart Stores, Inc.,* 141 F.3d 1453, 1455 (11th Cir. 1998); *Meeks v. Computer Associates International,* 15 F.3d 1013, 1021 (11th Cir. 1994); *Goldsmith v. City of Atmore,* 996 F.2d 1155, 1163 (11th Cir. 1993).

To satisfy the first element, Stone contends that letter she gave McGaha on the morning of her termination was the "protected activity" which served as the basis for retaliation. [Pl. Br. at 76]. The letter informs McGaha that Stone was not pleased with the previous day's counseling session regarding her job performance. [PX 62]. At the end of the letter, Stone states "[p]lease consider my request for better treatment." [PX 62]. Because this request for "better treatment" could be considered as a request for accomodation, the Court has determined that Stone has satisfied the first element of the prima facie case. *See Standard v. A.B.E.L. Services Inc.,* 161 F.3d 1318, 1328 (11th Cir. 1998). Additionally, because Stone suffered the adverse employment action of termination, the second element of her prima facie case has also been met. *See Gupta v. Fla. Bd. of Regents,* 212 F.3d 571, 587 (11th Cir. 2000). However, Stone still has the burden of proving that her termination was causally related to the submission of her letter. To meet this burden, a plaintiff is only required to show that the protected activity and the adverse action were not "wholly unrelated." *Goldsmith,* 996 F.2d at 1163. In order to show the two things were not entirely unrelated, a plaintiff must generally show that the decision maker was

aware of the protected conduct at the time of the adverse employment action. *Brungart v. Bellsouth Telecommunications, Inc.,* 231 F.3d 791, 799 (11th Cir. 2000). To establish causation, Stone relies primarily upon the short amount of time which elapsed between the delivery of her letter and her termination. [Pl. Br. at 76]. The Court has determined that this time period *alone,* while evidence of causation, is insufficient to prove causation, by itself. The law in this Circuit requires the *decision maker's* awareness of the protected conduct at the time of the adverse employment action. *See Brungart,* 231 F.3d 799. Stone has not presented evidence demonstrating that Andrea Rolser (the "decision maker" involved in Stone's termination) was aware of her letter on the date of her termination. However even if Stone could somehow satisfy the third element of the prima facie case, her claim would still fail because she cannot establish that Huntsville Hospital's legitimate non-discriminatory reason for her termination was a pretext for discrimination. Stone is disabled and she was terminated, but she has not shown that she was terminated because of a protected activity. The uncontroverted evidence is that that Stone was terminated for threatening a co-worker. Because Stone cannot establish a prima facie case of retaliation, Huntsville Hospital is entitled to summary judgement as to this claim.

III. Failure to Accommodate

Under the ADA it is unlawful for a covered entity not to make a reasonable accomodation of an otherwise qualified applicant or employee unless the covered entity can demonstrate that the imposition of the reasonable accomodation would impose an undue hardship on the operation of the business. 29 U.S.C. § 1630.9. The plaintiff bears

the burden of production of identifying an accomodation that would allow her to perform the job's essential functions, and the burden of persuasion with respect to demonstrating that such accomodation is reasonable. *See Lucas v. W.W. Grainger,* 257 F.3d 1249, 1255-56 (11th Cir. 2001). The duty to provide a reasonable accomodation is not triggered unless the employee makes a specific request for accomodation. *Gatson v. Bellingrath Gardens & Home, Inc.,* 167 F.3d 1361, 1363 (11th Cir. 1999). A plaintiff is not entitled to her preferred accomodation, only one that is reasonable. *Stewart v. Happy Herman's Cheshire Bridge, Inc.,* 117 F.3d 1278, 1285-86 (11th Cir. 1997). The law requires an employer to engage in good faith in an "interactive process" of accommodating a plaintiff, after the employer is informed of the need for accommodation. *Stewart,* 117 F.3d at 1286-87.

The first dispute between the parties regards whether Stone's duties as a mail courier are considered "essential functions." Stone contends that the functions are not essential and therefore could have been eliminated. However, employers are only required to provide accommodation when such accommodation would allow a disabled person to perform essential functions of his or her job. *See Lucas*, 275 F.3d at 1255-56. If the Court determines that the courier duties were essential functions, then Stone will not have a basis for a failure to accommodate claim. However, Stone contends that because her courier functions were not essential, they could have been eliminated from her list of job responsibilities, which would have relieved her stress and prevented her comments which resulted in her termination. [Pl. Br. at 35-38]. The Court must therefore determine whether Stone's functions as a courier were indeed essential.

Huntsville Hospital has presented evidence supporting the fact that Stone was assigned to courier duties with increasing frequency because her filing duties were decreasing as the hospital began keeping electronic records. [Newby Depo. at 35-36]. Stone herself testified that she understood her duties as a courier were becoming essential functions. For example, Stone states "it seems to be like mail was all of the sudden becoming more of one of my essential functions." [Stone Depo. at 127-29]. She was also told on January 10, 2000: "you are rated on mail room duties because they are an essential part of your job." [DX 55]. The courier duties also were not something new for Stone as she had often worked as a relief courier during her tenure at Huntsville Hospital. [McGaha Aff. ¶ 6; PX 37]. To support her contention that her courier duties were not an essential function, Stone cites work schedules which list her courier duties as a "secondary" function. However, Stone has not presented any authority which would support a finding that the term "secondary" is analogous to the term "non-essential." The Court has therefore determined that Stone's duties as a mail courier were indeed an essential function and will proceed under this conclusion.

Stone next contends that Huntsville Hospital never engaged in an "interactive process" to determine appropriate accommodations for her disability. [Pl. Br. at 71]. Huntsville Hospital contends that the accommodations provided to Stone were reasonable in light of her disabilities and that it did engage in an interactive process with Stone to determine those accommodations. [Def. Br. at 34-35]. Therefore, the proper analysis for this claim is: (1) whether Huntsville Hospital engaged in the interactive process; (2) whether the current accommodations provided

to Stone were reasonable; and (3) whether Huntsville Hospital was required to accommodate Stone so as to provide a stress free work environment.

Stone's contention that Huntsville Hospital did not engage in an interactive process of accomodation is unfounded. The briefs submitted by the parties include correspondence from Stone discussing accommodations with her employer. For example, Rosler's last written communication with Stone stated: "I want to meet with you as soon as possible to discuss whether there are accommodations within the policy that can be made to better meet any special needs you may have . . . we will consider any information you provide or information you request." This is evidence that Huntsville Hospital was indeed engaged in an interactive accommodation process with Stone.

In response to Stone's correspondence, Huntsville Hospital provided the following accommodations: (1) preparation of a written list of mail stops to carry while doing the rounds; this accommodation would alleviate the "confusion" Stone experienced with doing the mail rounds; (2) Patient Accounting keeping juice, snacks, and a glucose tester for Stone to monitor her diabetes while at work; and (3) other employees driving Stone to the Post Office when it was her responsibility to pick up the mail. [McGaha Aff. ¶ 6; Henderson Depo. at 51-54; McGaha Depo. II at 27-32]. The Court has determined that these accommodations are reasonable and undeniably allowed Stone to perform the essential functions of her job as evidenced by her continued employment.

The issue then becomes whether Huntsville Hospital should have accommodated Stone by alleviating the

criticism and work related stress which allegedly led her to make the comments which resulted in her termination. Huntsville Hospital is not under an obligation to provide a stress free work environment to employees under the ADA. "An employee's ability to handle reasonably necessary stress and work reasonably well with others are essential functions of any position. Absence of such skills prevents the employee from be 'otherwise qualified." *Williams v. Motorola, Inc.,* 303 F.3d 1284, 1290-91 (11th Cir. 2002). Stone does not dispute that her repeated reprimands and counseling from McGaha were a result of her inability to successfully complete the mail rounds. [Pl. Br. at 9]. Additionally, Stone has admitted that she is more sensitive than the average person. [Pl. Br. at 11]. This increased sensitivity may have caused Stone's job to be more stressful, but Huntsville Hospital is under no obligation to accommodate "stressed employees," only those who are disabled. After reviewing the evidence presented by the parties, it appears that Stone is unable to complete the essential functions of her mail courier job even with the written schedule accommodation and the transportation accommodation. Her inability to do this renders her not "otherwise qualified." The Court has also determined that Huntsville Hospital was not under an obligation to provide the accomodation of a "stress free" work environment.

Huntsville Hospital has also presented additional evidence of Stone's Social Security disability benefits application which states, under oath, that she was "totally and permanently disabled" on March 31, 2000, the same date of her termination. The Supreme Court has held that:

> "a plaintiff's sworn assertion in an application for disability benefits that she is, for example,

> "unable to work" will appear to negate an essential element of her ADA case – at least if she does not offer a sufficient explanation. For that reason, we hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation. *Cleveland v. Policy Management Systems,* 526 U.S. 795, 806 (1999).

The only evidence in the record which may be somehow construed as an "explanation" of the testimony in this application is one or two references to Stone's deteriorating health after her termination. [Pl. Br. at 54]. However, this evidence is not directed specifically at rebutting the evidence in the SSDI application. Stone's application specifically states: "her difficulties got worse" prior to her termination and "they prevented her from carrying out her new duties as courier at Huntsville Hospital in a satisfactory manner." [DX 8].

After reviewing the evidence presented by the parties, the Court has determined that Stone's inability to perform the essential functions of "courier/file clerk" keep her from being otherwise qualified, that is, able to perform the essential functions of her job with or without reasonable accomodation. Additionally, Stone has not identified any *reasonable* accommodation which would allow her to perform the essential functions of the courier position. Because Stone is not otherwise qualified, she is unable to satisfy the second element of her prima facie case and therefore her claim should fail. Accordingly, Huntsville Hospital is entitled to summary judgment as to this claim.

CONCLUSION

For the reasons set forth above, the Court grants Defendant Huntsville Hospital's motion for summary judgement as to Plaintiff Stone's discrimination, retaliation, and failure to accommodate claims.

DONE and **ORDERED** this 28th day of March, 2006.

/s/ Virginia Emerson Hopkins
VIRGINIA EMERSON HOPKINS
United States District Judge

(2)

Supreme Court, U.S.
FILED
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No. 06-795

IN THE

Supreme Court of the United States

KAY STONE,

Petitioner,

v.

THE HEALTH CARE AUTHORITY
OF THE CITY OF HUNTSVILLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Respondent, The Health Care Authority of the City Huntsville ("Huntsville Hospital"), was entitled to summary judgment on the claim of Petitioner Kay Stone ("Stone") that her employment was terminated because of disability discrimination and/or retaliation, where, following a reasonable investigation by the decision-maker, which included an interview of and a confession by Stone, the decision-maker reasonably concluded that Stone made a threatening remark concerning her supervisor in violation of Huntsville Hospital's well established and uniformly administered prohibition of such remarks?

LIST OF PARTIES

Respondent, The Health Care Authority of the City of Huntsville, d/b/a Huntsville Hospital, is a political subdivision of the State of Alabama organized under the Health Care Authorities Act of 1982, §§ 22-21-310, *et seq.* ALA. CODE (1975).

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STATEMENT OF THE CASE

The Statement of the Case included in the petition of Kay Stone ("Stone") does not fairly describe the factual circumstances in this litigation, which Respondent Healthcare Authority of the City of Huntsville ("Huntsville Hospital") provides below.

Despite a host of physical, intellectual, psychological, and personality disorders, Stone was hired in 1990 by Huntsville Hospital to work in the hospital's business office as a *"favor"* to her mother, who was a long-time supervisor in that office. (Doc. 49, Tab 29, Ex. 70 at 3; Doc. 1 ¶ 7; Doc. 49, Tab 5 ¶ 3; Doc. 49, Tab 30 at 4.)[1] Her job duties included the filing of patient records and relief for mail couriers in the hospital. (Doc. 49, Tab 5 ¶ 24; Doc. 49, Tab 4 ¶ 3.)

Although Stone *"struggled"* (Doc. 49, Tab 15 at 148), she was able to perform routine tasks with accommodations provided by Huntsville Hospital. (Doc. 49, Tab 5 ¶ 31.) She *"was happy to have a job [and] some coworkers that cared about her."* (Doc. 49, Tab 5 ¶¶ 31, 44.) Stone *"loved"* her supervisor, Joann McGaha, whom she referred to as her *"other mother."* (Doc. 53, Tab D ¶ 8.) There were times, however, when Stone would refuse to follow instructions and do things *"that sometimes do not make sense,"* which her mother believed was because she wanted *"to assert herself"* and *"make her feel good about herself."* (Doc. 49, Tab 6 ¶ 4; Doc. 49, Tab 1 ¶ 3; Doc. 49, Tab 28, Ex. 41; Doc. 49, Tab 29, Ex. 119.)

Although Stone's unwillingness to follow directions created problems (Doc. 49, Tab 29, Ex. 120; Doc. 49, Tab 29, Exs. 55, 56, 86; Doc. 49, Tab 15 at 27), Huntsville Hospital did not

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1. Citations in this opposition are to the record in the court of appeals, except where citation is made to Stone's Petition for Writ of Certiorari.

impose discipline on Stone, as it would other employees. (Doc. 49, Tab 5 ¶ 31.)

Also, during the last *"year or two"* of Stone's ten-year employment with Huntsville Hospital there was a significant change in her work performance. Stone, who was already *"slow,"* became a *"whole lot slower."* (Doc. 49, Tab 27 at 184-85.) By Stone's own estimate, her performance fell by a *"good 75 percent."* (*Id.* at 185-86.)

In addition to the dramatic decline in Stone's performance, and her refusal to follow instructions, Stone was *"hypersensitive,"* which made it difficult to counsel her because it *"cause[d] her to hear many things that weren't intended or that weren't there."* (Doc. 49, Tab 15 at 47, 132, 133, 135-37, 160-62.) As explained by one of Stone's psychologists, her hypersensitivity caused her to take counseling *"very personally so that 'you didn't file that right' [became] 'you're a worthless worker.'"* (Doc. 49, Tab 15 at 137.) Stone's perception of helpful corrections by a supervisor as *"harsh and unfeeling"* would *"enrage her more than it would the average person"* (*id.* at 47) and cause her to overreact, even suicidally, at work. (Doc. 49, Tab 23 at 81-82, 173-75 and Ex. 19 thereto; Doc. 49, Tab 25 at 271.) In such instances, Stone's anger *"would come storming out in a kind of not very well modulated, not very well thought through, not very adult explosion."* (*Id.* at 33.) As a result, she would say or do *"something outrageous either indicating that she would try to hurt the person or try to hurt herself."* (*Id.* at 55.)

A good example of Stone's inappropriate response to counseling occurred several months prior to the termination of her employment, after Stone deliberately refused to comply with her supervisor's (McGaha's) instructions. (Doc. 49, Tab 29, Ex. 122) (*"I admit I was stupid ... I didn't obey my bosse's [sic] orders."*) McGaha decided to counsel with her

and asked another supervisor, who is *"someone who is kind"* and *"who Kay is very fond of,"* to participate. (Doc. 49, Tab 29, Ex. 119; Tab 3 ¶¶ 7, *et seq.*) However, when McGaha and the other supervisor tried to explain to Stone that she should not disregard McGaha's instructions, Stone became *"terribly upset," "stormed out mad and crying"* and threatened suicide, stabbing her wrist with scissors. (Doc. 49, Tab 3 ¶ 7; Tab 4 ¶ 9; Tab 7 ¶ 7; Tab 23, Ex. 19; Tab 29, Exs. 119 and 120.)

Another such incident occurred the day before the termination of Stone's employment, after McGaha told Stone that she was *"disappointed"* in her failure to complete her work on time and said, *"Let's stay on schedule tomorrow . . . [and] get our deliveries on time."* (Doc. 49, Tab 17 at 37-40, 41, 55; Tab 27 at 239; Tab 28 Ex. 63.) According to Stone's own handwritten description of the incident, she became so angry and upset that she *"felt like she was going to choke"* McGaha and that her mother had to give her *"two Xanax"* to calm her down. (Doc. 49, Tab 29, Ex. 61.)[2]

The next morning, during her lunch break, Stone told a co-worker, Amy Ashby ("Ashby"), that she had gotten so angry with McGaha the previous afternoon that she felt like she was going to choke McGaha's neck and she made a choking gesture with her hands. (Petition at 11a.) Stone's

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2. A few weeks earlier, the Office Manager documented her concern that Stone *"could be a threat to herself and/or other employees."* (Doc. 53, Tab A, Ex. 33; Doc. 49, Tab 5 ¶ 57.) Another supervisor testified:

> I observed that Kay was emotional — very emotional, and there appeared to be something brewing there. Couldn't put your finger on it, but it was — the outburst did not surprise me because it's like — I guess like a balloon ready to pop or something.

(Doc. 49, Tab 12 at 100.)

comment and actions *"really bothered"* Ashby so she told McGaha who reported this information to the Human Resources Department and her manager, Jan Henderson. (Petition at 11a.) A Human Resources representative instructed McGaha to have Ashby document Stone's comments, which McGaha did and took to Andrea Rosler, the hospital's Vice President of Human Resources. (Petition at 11a-12a.). Rosler decided to meet with Ashby personally and hear exactly what Stone said, and McGaha was given permission to go home early. (Petition at 12a.)

Ashby told Rosler that Stone said that McGaha's criticism of her work the previous day had made her so angry that she had wanted to *"choke"* McGaha, and that her mother had to give her two Xanax to calm her down. Ashby also told Rosler that Stone was still *"furious"* and was *"rocking back and forth"* while she was relating the incident. (Doc. 49, Tab 5 at ¶ 55; Doc. 49, Tab 21 at 299-300.) Ashby told Rosler that she was *"really bothered"* by Stone's comments because she thought that Stone was *"serious about hurting"* McGaha. (Doc. 49, Tab 5 at ¶ 55; Doc. 49, Tab 21 at 296-304.)

Ashby also told Rosler that Stone often talked about *"getting"* people who she believed did her wrong and that Stone had made statements before about harming McGaha, who is blind in one eye, such as threatening to *"poke [McGaha's] good eye out."* (Doc. 49, Tab 5 ¶¶ 56-57; Doc. 49, Tab 8 at ¶ 38.) Ashby also told Rosler that Stone once told her about wanting to hurt one of her doctors because he had *"f_ _ _ _ d her over"* and that Stone had been so furious on a telephone call to her doctor's office that it *"scared"* her. Ashby also told Rosler that Stone had talked about *"getting rid"* of the doctor's wife. (Doc. 49, Tab 5 ¶ 56.)

Rosler and Henderson then met with Stone, who admitted to making the alleged statement. (Doc. 49, Tab 5 ¶ 61; Doc. 49, Tab 27 at 248-49 and Ex. 59 thereto; Doc. 49, Tab 13 at 134.) During this litigation, Stone has admitted that during her discussions with Rosler, she *"confess[ed] to a crime"* that she now says that *"she did not commit."* (Doc. 81 at 39.) Stone's handwritten notes of her discussions with Rosler and Henderson state: *"Andrea Rosler asked me if I said that I felt like choking Joan McGaha's neck and me being honest I said yes. . . ."* (Petition at 12a.)

On the basis of Stone's confession, and the evidence of other threatening comments by Stone, Rosler concluded *"that virtually all of the 'risk factors' indicating the possibility of work place violence were present"* and that Stone's comments had violated the hospital's *"zero tolerance"* policy, which prohibits threatening remarks regardless of intentions. (Petition at 12a; Doc. 49, Tab 5 ¶¶ 52, 66.) Just two days before Stone's termination, another hospital employee (an African-American male) was terminated under that policy for making a threat after a confrontation with another hospital employee, although that employee claimed that he was *"not serious."* (Petition at 12a-13a.)

Accordingly, Rosler decided to terminate Stone's employment. When she so advised Stone, Stone lost control and began hitting her head on the bookshelf while yelling, *"I am going to sue this [G _ _ D _ _ _] hospital."* (Doc. 49, Tab 2 ¶ 25.) Stone then stormed out, threatening suicide. When security guards sought to physically restrain Stone from climbing over the guard railing outside the department office, she began hitting them and the walls of the hallway, finally lying on the floor. (Doc. 49, Tab 5 ¶ 63.) Later, Stone went back to her office in a *"total rage."* (Doc. 49, Tab 1 ¶ 8.)

Several months after her employment was terminated, Stone applied for disability ("SSDI") benefits from the Social Security Administration, certifying that her impairments *"got worse"* prior to her termination and prevented her from carrying out her job duties in a *"satisfactory manner."* (Doc. 49, Tab 29, Ex. 8.) On that basis, Stone stated that she was *"totally disabled"* on the same date she was terminated. (*Id.*, Ex. 9.) Applying *Cleveland v. Policy Management Systems*, 526 U.S. 795, 806 (1999), the district court found that Stone had not provided a "sufficient explanation" for her assertion that she was "totally and permanently disabled" on March 31, 2000, the date of her termination, and concluded that "Stone's inability to perform the essential functions of courier/file clerk keep her from being otherwise qualified, that is, able to perform the essential functions of her job with or without reasonable accommodation" and, thus, "unable to satisfy the second element of her prima facie case." (Petition at 23a.)

The district court and the court of appeals also determined that "the record demonstrates that the reason for Stone's termination was her threat made against her supervisor . . . , that no reasonable accommodations were denied to Stone and Huntsville Hospital did not retaliate against her." (Petition at 2a.)[3]

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3. Prior to that, another district judge also granted summary judgment and dismissed Stone's claims, but that order was vacated and remanded because it adopted Huntsville Hospital's briefs as the opinion of the court. (Petition at 5a.)

THE REASONS WHY STONE'S PETITION SHOULD BE DENIED

Stone's petition argues that different standards are applied by the courts of appeal in cases involving allegations that a higher-ranking official took adverse action against an employee because of influence by a lower ranking official with discriminatory animus. According to Stone, the Fourth Circuit's decision in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 227, 291 (4th Cir. 2004) (*en banc*), *cert. dismissed*, 543 U.S. 1132 (2005), imposes too stringent a standard in so-called *"cat's paw"* or *"rubber stamp"* cases and allows the employer to avoid liability even if a subordinate supervisor with discriminatory animus "had a substantial influence on the ultimate decision or ... played a role, even a significant one, in the adverse employment decision." (Petition at 7.) According to Stone, cases like *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), correctly hold that liability should be imposed if the higher ranking official's decision would not have been made had it not been for the lower ranking official's *"recommendation"* or *"influence."* (Petition at 9-10, citing also *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004).)

Stone argues that the Eleventh Circuit *"has taken an approach similar to the Fourth Circuit's"* (Petition at 7), and that this Court should grant review of this matter or to hold her petition pending the review of *BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC*, No. 06-341, *cert. granted*, Jan. 5, 2007.

Huntsville Hospital does not dispute that in *Hill* the Fourth Circuit described the standard that it followed in that case as different from that applied by other courts of appeal. However, for the reasons discussed below, there are multiple reasons Stone's petition in this case should be denied.[4]

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4. *See South Dakota v. Kansas City S. Indus., Inc.*, 880 F.2d 40 (8th Cir. 1988), *cert. denied*, 493 U.S. 1023 (1990); *Sommerville v. United States*, 376 U.S. 909 (1964); *Sanson Hosiery Mills v. NLRB*, 344 U.S. 863 (1952); *The Arlington, Inc. v. Mayer*, 339 U.S. 965 (1950).

1. Stone's Petition Mischaracterizes the Eleventh Circuit's Standard.

Stone argues that an employer in the Eleventh Circuit can effectively insulate itself from liability under the anti-discrimination laws for most, if not all, of its employment decisions, regardless of whether a particular action was based on *"false information"* supplied by a supervisor motivated by discrimination or retaliation, by having a higher ranking official conduct a *"paper review"* of that *"false information."* (Petition at 9.) Stone also asserts that while *"earlier Eleventh Circuit decisions"* recognized that a biased supervisor's *"influence"* over the employer's decision was the *"touchstone of employer liability,"* *"more recent decisions"* have *"abandoned"* that standard in favor of a more stringent approach. (Petition at 7-8.)

Stone's characterization of the Eleventh Circuit's standard is not accurate. In fact, the cases cited by Stone as support for her argument that the Eleventh Circuit has *"abandoned"* the *"influence"* standard actually hold to the contrary. (Petition at 7-8.) For example, in *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328 (11th Cir. 1999), *reh'g denied*, 200 F.3d 818, *cert. denied*, 529 U.S. 1053 (2000) (cited by Stone at page 8 of her Petition), the Eleventh Circuit focused on the alleged causal connection between the alleged bias and the adverse employment action and described its standard in *"cat's paw"* or *"rubber stamp"* cases as follows:

> One way of proving that the discriminatory animus behind the recommendation caused the discharge is under the "cat's paw" theory. This theory provides that causation may be established if the plaintiff shows that the decisionmaker followed the biased recommendation without independently investigating the complaint against the employee. In such a case, the recommender is

> using the decisionmaker as a mere conduit, or "cat's paw" to give effect to the recommender's discriminatory animus.

186 F.3d at 1332 (emphasis added). Then, contrary to Stone's argument that it *"abandoned"* its earlier rule *"that influence was the touchstone for employer liability"* (Petition at 7), the Eleventh Circuit expressly stated that "[i]n this case, Stimpson has not introduced any evidence that could reasonably indicate that the City's alleged discriminatory animus ***influenced*** the Board's decision to terminate her." 186 F.3d at 1332 (emphasis added.)

Similarly, in *Llampallas v. Mini Circuits, Inc.*, 163 F.3d 1236 (11th Cir. 1998), *reh'g denied*, 178 F.3d 1305, *cert. denied*, 528 U.S. 930 (1999), another case cited by Stone as support for her *"abandonment"* argument (Petition at 6), the Eleventh Circuit not only cited and applied its *"earlier"* decisions in the *Sparks* and *Weaver* cases, which Stone asserts were *"abandoned"* in that case (Petition at 5), the Eleventh Circuit also cited and applied what Stone argues is the *"correct standard"* of the Seventh Circuit in *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990) (cited in Petition at 9, 11). 163 F.3d at 1248. Furthermore, the Eleventh Circuit considered and rejected the suggestion made by Stone at page 9 of her petition that an employer in the Eleventh Circuit can escape liability for a subordinate's bias by having a higher ranking official conduct a *"paper review"* of *"false information"* supplied by that subordinate. 163 F.3d at 1249. Instead, the Eleventh Circuit specifically observed:

> [I]f the plaintiff shows that the harasser employed the decisionmaker as her "cat's paw"-i.e., the decisionmaker acted in accordance with the harasser's decision ***without herself evaluating the employee's situation***-causation is established. If

> . . . [the decisionmaker] did not conduct ***his own independent investigation***, and instead merely "rubber stamped" the recommendations of [those who held a discriminatory animus], the causal link between [the plaintiffs'] protected activities and their subsequent termination, would remain intact.

Id. at 1249 (emphasis added.)

The third decision cited by Stone as support for her argument that the Eleventh Circuit has abandoned the *"influence"* standard, *Wescura v. City of South Miami*, 257 F.3d 1238, 1247 (11th Cir. 2001) (Petition at 6), did not define much less apply the *"cat's paw"* standard. Instead, it rejected the assertion by the plaintiff in that case that he had "created a jury issue with respect to the discrimination on the party of a dominant decision-maker (the Mayor) whose decision was rubber-stamped by others (the Commissioners)," because there was no substantial evidence of discriminatory intent on the part of the Mayor. 257 F.3d at 1246-1247.

The fourth case cited by Stone, *McShane v. U.S. Attorney General*, 144 Fed. Appx. 779, 791 (11th Cir. 2005), is an unpublished decision by a panel of the Eleventh Circuit which observed that the decisionmaker had "considered" the input by a person with unlawful animus, but "made the employment decision based on the totality of the circumstances." 144 Fed. Appx. at 791. Although it is not clear just what input was "considered" by the decision-maker in *McShane*, that unpublished decision is not precedent, *see* 11th Cir. R. 36-2, and it was neither cited nor relied on by the district judge or Eleventh Circuit in its unpublished decision in this case.

Other *"more recent"* Eleventh Circuit cases also recognize, contrary to Stone's assertions, that an employer

cannot avoid liability by showing a *"paper review"* by a higher ranking official *"false information"* supplied by a biased supervisor. For example, in *Wright v. Southland Corp.*, 187 F.3d 1287 (11th Cir. 1999), the Eleventh Circuit specifically observed that one way a plaintiff can show a *"causal link"* sufficient to impose liability on the employer is by evidence that the subordinate with bias was able to manipulate or ***"influence"*** the decision "by providing ***false information*** to the decisionmakers for consideration in their decision." 187 F.3d at 1304 n.20 (emphasis added); *see also Holifield v. Reno*, 115 F.3d 1555, 1563-64 (11th Cir. 1997) ("The biases of one who neither makes nor ***influences*** the challenged personnel decision are not probative in an employment discrimination case.") (emphasis added) (quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 10 (1st Cir. 1990)).

Stone's assertion to this Court that the Eleventh Circuit has *"abandoned"* the standard that a biased supervisor's *"influence"* was the *"touchstone"* of employer liability is not only contrary to what the Eleventh Circuit has held, it is also contrary to Stone's prior characterizations in this case of the Eleventh Circuit's standard. Indeed, Stone's opening brief to the Eleventh Circuit asserted that the case law in the Eleventh Circuit was *"clearly established and controlling"* and that it *"recognized that employers are nevertheless liable when a subordinate with bias influences an unbiased decisionmaker to terminate an employee."* (Initial Brief of Appellant at 43.) Stone even cited the Eleventh Circuit's decision in *Llampallas* as the basis for her claim that *"clearly established and controlling Eleventh Circuit case law"* holds that the *"cat's paw"* standard is met when there is evidence that the subordinate with bias was able to *"manipulate or influence"* the decision *"by providing false information to the decisionmakers for consideration in their decision."* (Initial Brief of Appellant at 43-44.) As discussed above,

Stone's petition to this Court cites *Llampallas* for the contrary proposition. (Petition at 8-9.)[5]

2. There Was No Reason For Either The District Court Or The Eleventh Circuit To Apply The Cat's Paw Analysis In This Case.

Not only does Stone mischaracterize the Eleventh Circuit's standard in *"cat's paw"* cases, there was no basis or evidence in this case, regardless of the standard applied, that would change the ultimate outcome of this litigation.

Stone's own contemporaneous notes and her admitted *"confession"* to Rosler of what she had said made it unnecessary for either the District Court or the Eleventh Circuit to address Stone's argument that Rosler allowed herself to become McGaha's *"cat's paw."* Neither was there any evidence that Rosler acted on the basis of a *"recommendation"* by McGaha or on an *"embellished"* written statement that McGaha obtained from Ashby. Instead, it is undisputed that McGaha never made any recommendation and Rosler's decision to terminate Stone was not based on a *"paper review"* by Rosler of *"false information"* supplied by McGaha. (Doc. 49, Tab 5 at ¶ 69.) Even Stone's petition concedes that Rosler did not merely conduct only a *"paper review"* of information supplied by McGaha and *"rubber stamp"* McGaha's recommendation, but that Rosler *"conducted an investigation of the allegation, including interviewing the co-worker and interviewing plaintiff, and reasonably concluded, based on the information she had, that plaintiff threatened to kill her supervisor."* (Petition at 5.)

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5. The Fourth Circuit's opinion in *Hill* expressly distinguished the Eleventh Circuit's decisions in *Stimpson* and *Llamapallas* and "decline[d] the opportunity to further parse the varying applications of the cat's paw or rubber stamp theory as employed by our sister circuits." 354 F.3d at 289-90.

The undisputed evidence established that during Rosler's interview of Stone, Stone *"confessed to a crime"* that she now claims that she did not commit. (Doc. 81 at 39.) Furthermore, Stone's own notes of her interview by Rosler acknowledged that her *"confession"* to Rosler was *"honest."* (*Id.* at Ex. 59) (*"Rosler asked me if I said that I felt like choking Joan McGaha's neck and me being honest I said yes, . . . she made me mad. . . . I was going to F_ _ _ _ _ g sue all of them."*) On that basis the district court correctly observed:

> The Court has taken notice of the conflicting evidence presented by the parties regarding the statement Ashby provided to the Human Resources Department. The Court cannot make findings of credibility at the summary judgment stage, however, the Court has determined that the conflicting statements given by Ashby are not needed to determine summary judgment in this case. Consequently, the opinion of this Court has not been founded on Ashby's statement to Human Resources.

(Petition at 11a - 11b n.4.)

3. The Eleventh Circuit And The District Court Correctly Decided The Case On The Merits.

a. Stone's Statements Constituted Grounds for Discharge.

Stone asserts that her comment to Ashby about *"choking"* McGaha was just a *"laughing" "figure of speech."* However, Stone's own handwritten notes of her feelings at the time confirm that Rosler's concern was justified. (Doc. 49, Tab 29, Ex. 61) (*"I felt so upset . . . I felt like I was going to choke her neck."*) *"[S]he made me mad . . . my mom had to calm me down with some Xanax – I made*

the gesture with my hands." (Doc. 49, Tab 29, Ex. 59.) Indeed, Stone's arguments in this case have acknowledged that when Stone was interviewed by Rosler, she ***"confess[ed] to a crime."*** (Doc. 81 at 39) (emphasis added.)

Stone has argued that Rosler should have conducted a more *"thorough investigation"* but has never explained what was left to investigate after her *"confession."* To be sure, Rosler could have investigated Ashby's report of other threatening statements by Stone, but there is no evidence that would call into question Ashby's report of such other threats. Instead, during pretrial discovery, Stone's co-employees confirmed what Ashby told Rosler. For example, another of the mail couriers, Angie Tallent, testified that Stone referred to McGaha as the *"one-eyed monster"* and made *"a lot of vulgar remarks"* about her. (Doc. 49, Tab 6 at ¶¶ 8-9.) Tallent also believed that Stone disliked McGaha so much that *"she was capable of doing something bad to her."* (*Id.*) Mary Baker, who shared a work area with Stone, testified that Stone *"did not like McGaha"* and was *"angry"* at McGaha *"much of the time,"* that Stone referred to McGaha as the *"one-eyed monster"* and once said, *"One of these days I'm going to take a pair of scissors and poke her good eye out."* (Doc. 49, Tab 1 at ¶ 5.)

Neither is there any basis for Stone's argument that Rosler's concerns over her comments were not justified. Indeed, Stone's own mother wrote to Stone's psychologist just a few months after her termination stating similar concerns. (Doc. 49, Tab 23, Ex. 21) (*"Last Saturday, I got very scared that she might harm me or herself, . . . I frankly became scared of her violence and uncontrolled speech. . . . She was actually foaming at the mouth. [H]er recent violence and rage . . . worry me very much."*) Even before that, Stone had physically assaulted her psychologist, Dr. Tom Johnson. (Doc. 49, Tab 15 at 52-53; Doc. 49, Tab 23 at 79), and frequently made threats of *"strangling"* people, including

her endocrinologist, her psychologist, and the daughters of her psychotherapist. (Doc. 49, Tab 15 at 55, 140-41.)[6]

Stone has argued that her comments were misunderstood; however, as the district court held (Petition at 15a), when an employer is faced with threatening comments, the employee's after-the-fact characterization that no threat was intended is not determinative. As the Seventh Circuit Court of Appeals has observed:

> [Plaintiff] argues that he has been misunderstood; that he hadn't meant to threaten anybody. But the issue is not whether Merheb was a menace; it's whether he appeared to be. . . . [A]n employer need not tolerate the continued presence of an employee who has terrified his coworkers merely because the technical elements of an assault are not present. Only if the other employees' frightened reactions to the words or conduct of a fellow employee were completely unreasonable would the employer be obligated to disregard them.

Merheb v. Illinois State Toll Highway, 267 F.3d 710, 713-14 (7th Cir. 2001). Other courts have agreed. *Johnson v. AT&T*, 422 F.3d 756, 762 (8th Cir. 2005) (where employee terminated for bomb threat, the proper inquiry is not whether he had made the bomb threats, it is whether the employer honestly believed that he did); *Rose v. Laskey*, 110 Fed. Appx. 136, 137 (1st Cir. 2004) ("Whatever plaintiff's ultimate intention, defendant cannot be faulted for taking this threat at face value."); *Palmer v. Circuit Court of Cook County*,

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6. Stone's psychologist testified that, when Stone threatened to strangle his daughters, he was concerned enough to breach his duty of confidentiality, tell his daughters that a patient had threatened them, and give them a description of Stone. (Doc. 49, Tab 15 at 55-57.)

Illinois, 117 F.3d 351 at 352-53 (7th Cir. 1997) (retention of employee who made threatening remarks that caused "justifiable anxiety to coworkers" not reasonable). *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (pretext inquiry is directed to the employer's *beliefs*, not to what the employee says the employer should have believed).

Stone seems to think that there is a meaningful difference between an employee's threatening to harm her supervisor and admitting that she got so angry and upset that she wanted to and actually *"felt like"* she was *"going"* to do so. However, even if Stone did not want to harm McGaha, her statement, nevertheless, violated Huntsville Hospital's *"zero tolerance"* policy. Under that policy other employees of Huntsville Hospital had been terminated for making threatening remarks even though they claimed that they were *"not serious"* about carrying out those threats. (Doc. 49, Tab 5 ¶¶ 34 *et seq.*) Indeed, just two days before Stone was terminated, another employee was terminated following an alleged *"unintended"* threat to a fellow employee that he claimed was not serious. (Doc. 49, Tab 20 at 240-41; Doc. 49, Tab 5 ¶¶ 48, 67-68.)

Huntsville Hospital's *"zero tolerance"* policy was well justified by potential "[c]laims of negligent hiring, supervision, and retention [which] loom large in the minds of employers and their lawyers." *Palmer*, 117 F.3d at 352-53 (7th Cir. 1997) (retention of employee who made threatening remarks that caused "justifiable anxiety to coworkers" "would place the employer on a razor's edge — in jeopardy of violating the [ADA] if it fired an employee, yet in jeopardy of deemed negligence if it retained him, and he hurt someone"). *See USA Petroleum Corp. v. Hines*, 770 So. 2d 589 (Ala. 1999) (affirming judgment for plaintiff who was assaulted by employee of defendant corporation, where corporation knew or should have known of employee's unfitness).

b. There Was No Substantial Evidence That McGaha "Manipulated" the Decision to Terminate Stone's Employment.

Stone argues that McGaha engineered her termination through false allegations. In fact, however, there was no recommendation by McGaha that Stone's employment should be terminated, McGaha had no authority to fire Kay or anyone else, and Rosler made the decision to terminate Stone with no input or recommendation by McGaha. (Doc. 49, Tab 5 ¶¶ 43, 66.)

Stone argues that McGaha caused Ashby to *"embellish"* her written statement of what Stone said to her, but the alleged language in question was, in fact, consistent with Stone's own admission that she *"felt like she was going to choke [McGaha's] neck"* when making *"the gesture with [her] hands."* (Doc. 49, Tab 29, Exs. 59 and 61.) Moreover, Ashby's testimony has never deviated from the essential facts that caused her to perceive Stone's remarks as an imminent threat to McGaha's safety — not a joke, and not a figure of speech. (Doc. 49, Tab 8 at 25-26, 159) (*"McGaha was in danger of imminent harm from[Stone]."*) In any event, the evidence is undisputed that Rosler did not make the decision to terminate Stone's employment on the basis of her *"paper review"* of Ashby's written statement. Instead, Rosler interviewed both Ashby and Stone and her decision was based on the information she obtained during those interviews. Rosler made the decision to terminate Stone with no input or recommendation by McGaha and would have made the same decision regardless of the language that McGaha allegedly added to Ashby's statement. (Doc. 49, Tab 5 at ¶ 69.)

Furthermore, there is no basis for the Stone's suggestion that McGaha's alleged attempt to *"influence"* the outcome of Rosler's investigation carried over into Rosler's interview

of Ashby. (Pl. Br. at 45.) That suggestion was not only expressly disavowed by Ashby (Doc. 49, Tab 8 at 155, 158-59), Ashby testified that all of the information attributed to her in Rosler's memorandum prepared of her investigation (Doc. 53, Tab A, Ex. 6) was entirely truthful and an accurate summary of what transpired. (Doc. 49, Tab 8 at 110-13, 143-44, 159.) Thus, even if it were arguable that McGaha was motivated by a discriminatory animus and wanted to *"influence"* the termination process, it is undisputed that she did not succeed in doing so.

c. There Was No Substantial Evidence That McGaha Was Prejudiced Toward Stone.

Stone has argued that discriminatory animus by McGaha can be *"infer[red]"* based on McGaha's *"increasingly negative . . . evaluations"* of Stone's performance in 1998 and 1999. (Pl. Br. to Eleventh Circuit at 8.) According to Stone *"during the final year or two of [her] employment,"* McGaha started *"using standards that had never been applied to her before"* and that *"negative performance evaluations"* were given by McGaha *"in an effort to get her fired or to get her to quit."* (*See* Doc. 54 at 32; Doc. 81 at 11.)

In fact, Stone, who was already much slower than her co-workers, admitted in her deposition that during the *"year or two"* before her termination, she became a *"whole lot slower"* in her performance. (Doc. 49, Tab 27 at 184-85.) By Stone's own estimate, her performance fell by a *"good 75 percent."* (Doc. 49, Tab 27 at 185-86.) The decline in Stone's performance affected all aspects of her work. (Doc. 49, Tab 27 at 184) (*"I was all of a sudden slower it seemed in everything."*) Stone's estimate of a *"75 percent"* decline in her performance during that last *"year or two"* is consistent with McGaha's observations that it took Stone *"twice as long"* to complete assigned tasks. (Doc. 49, Tab 28, Ex. 47.)" *These are the same duties she has done for 8 years."* (Doc. 49, Tab 28, Exs. 47, 78.)

The mere fact that McGaha agreed with Stone's own assessment of the indisputable and dramatic declines in Stone's performance (Doc. 49, Tab 27 at 184) is certainly not evidence of *"unfair"* appraisals or *"new performance standards."* Stone's hypersensitivity may have caused her to think that McGaha's lower appraisals of her performance in 1998 and 1999 were *"unfair,"* but that did not make them so. Nor does that evidence, in light of Stone's admission that she was *"all of a sudden slower, slower it seemed in everything"* (Doc. 49, Tab 27 at 184), support any inference of discriminatory animus.

4. Stone Never Established a Prima Facie Case of Discrimination.

The Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973 prohibit employment discrimination against a "qualified individual with a disability," who, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); 29 U.S.C. § 794.

The district court found that Stone did not show that she was able to perform the essential functions of her job with or without accommodations:

> After reviewing the evidence presented by the parties, it appears that Stone is unable to complete the essential functions of her mail courier job even with the written schedule accommodation and the transportation accommodation. Her inability to do this renders her not "otherwise qualified."

(Petition at 22a.) The district court also concluded that Stone had not identified any *reasonable* accommodation which would allow her to perform the essential functions of her

position. (Petition at 23a.) On that basis the district court held that "[b]ecause Stone is not otherwise qualified, she is unable to satisfy the second element of her prima facie case and therefore her [discrimination] claim should fail. Accordingly, Huntsville Hospital is entitled to summary judgment as to this claim." (Petition 23a.)

5. Stone Has No Valid Claim Of Retaliation.

Stone's retaliation claim is groundless because, as demonstrated above, she was terminated for the nonretaliatory reason that she made threatening statements concerning her supervisor.

Moreover, the only "protected activity" alleged by Stone in the district court was a letter, ghostwritten by her mother, which states that her feelings were *"hurt"* by her supervisor's counseling and she requests *"better treatment."* Nothing in this letter "opposes" any conduct prohibited by the ADA or requests any reasonable accommodation under that statute, nor was it "objectively reasonable" for Stone to believe so, as required for a claim of discriminatory retaliation. Instead, as demonstrated above, the only evidence is that McGaha's comments that Stone considered *"harsh"* was merely that McGaha was *"disappointed"* in her performance that day. (Doc. 49, Tab 27 at 239.)

6. The Opinion Below Has No Precedential Value.

Under the Rules of the Eleventh Circuit, "[u]npublished opinions are not considered binding precedent," though "[t]hey may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made." 11th Cir. R. 36-2.

CONCLUSION

Although the courts of appeals have phrased the relevant inquiry in *"cat's paw"* or *"rubber stamp"* cases in various ways, they recognize that the issue in such cases is whether there was a causal connection between the alleged bias and the adverse employment action. That is the standard followed by the Eleventh Circuit. Even if Stone had demonstrated that there is a clear conflict between the standard applied by the Fourth Circuit and that of other circuits, there would be no basis for the Court to grant review of this case because there is no evidence that the termination of Stone's employment was caused or influenced by the action of a biased supervisor. Accordingly, the Petition should be denied.

Respectfully submitted,

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